Supreme Court, U.S.
FILED

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No. ____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JANET ROACH
Petitioner,

v.

BEAUFORT COUNTY SCHOOLS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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87 pp

QUESTION PRESENTED

Whether the North Carolina Courts are free to interpret the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (1988 ed. & Supp. V), in a manner that relieves the local educational agency of its duty to develop an Individualized Educational Plan as required by 20 U.S.C. § 1401(a)(18), when the parent has placed the child in a private facility?

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No. _____

In The Supreme Court of the United States
October Term, 1994

Janet Roach, *Petitioner*

v.

Beaufort County Schools, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Janet Roach respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of North Carolina in this case.

OPINIONS BELOW

The Supreme Court of North Carolina entered its Order on June 23, 1994 (App., *infra*, 1a-2a) denying Petitioner's Petition for Discretionary Review of the decision of the Court of Appeals of North Carolina reported at 443 S.E.2d 339 (N.C. Ct. App. 1994) (App., *infra*, 3a-21a).

JURISDICTION

The Supreme Court entered its Order on June 23, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Section 1412 of the Individuals with Disabilities Act, 20 U.S.C. § 1412, provides, in relevant part, that each child with disabilities has "the right to a free appropriate public education." Section 1401(a)(18)(D) requires that the free appropriate education be "provided in conformity with the individualized education program required under section 1414(a)(5) of this title." Section 1415 provides that parents or guardians "have the right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to amount in controversy."

STATEMENT OF THE CASE

This case was filed by Petitioner, Janet Roach, September 26, 1989 in the Office of Administrative Hearings pursuant to North Carolina's Administrative Procedures Act, N.C. Gen. Stat. § 150B-23, alleging that Respondent, Beaufort County Schools, had failed to provide a free appropriate public education for Petitioner's daughter. A hearing was held and the Administrative Law Judge issued a Recommended Decision to the State Board of Education in Petitioner's favor. (App., *infra*, 49a-57a.)

Based on the record of the Administrative Hearing, the North Carolina State Board of Education adopted in full the Administrative Law Judge's Findings of Fact and Conclusions of Law as contained in his Recommended Decision and ruled that Respondent must provide Petitioner's daughter with an

appropriate education and must reimburse Petitioner for reasonable private placement costs from February 22, 1989 until the school system so provided an appropriate education. (App., *infra*, 47a-48a, 56a.)

Pursuant to the North Carolina Administrative Procedures Act, Respondent filed a Petition for Judicial Review in the Beaufort County Superior Court and the local judge reversed the decision of the State Board of Education. (App., *infra*, 39a-46a.)

Petitioner gave notice of appeal to the North Carolina Court of Appeals which filed an opinion vacating and remanding the trial court's decision on February 15, 1994. (App., *infra*, 24a-38a.) However, on February 16, 1994, Respondent's attorney wrote a letter to the Court of Appeals pointing out that it had relied upon a statute enacted subsequent to the filing of that action in rendering its decision. The Court of Appeals therefore entered an order withdrawing this opinion on February 18, 1994. (App., *infra*, 22a-23a.)

On April 19, 1994, the Court of Appeals issued a new opinion (App., *infra*, 3a-21a.) holding that "insufficient evidence exists to support the [State] Board's conclusion that [Respondent] failed to provide a free appropriate education for Ginger." (App., *infra*, 20a.) The court acknowledged that respondent had failed to fully develop an IEP. (App., *infra*, 15a.)

Petitioner filed for discretionary review to the Supreme Court of North Carolina on the ground, *inter alia*, that the Court of Appeals had erroneously concluded that failure to fully develop an IEP does not necessarily constitute failure to provide a free appropriate public education. Petitioner noted in her petition that this conclusion is in direct conflict with earlier interpretations of IDEA by this Court. The Supreme Court denied Petitioner's petition. *Beaufort County Schools v. Roach*, 443 S.E.2d 339 (N.C. Ct. App. 1994) (App., *infra*, 1a-2a).

Petitioner's daughter, Ginger Leigh Goforth, was a behaviorally-emotionally handicapped (BEH) child with a long history of aggressive and violent behavior.

Petitioner's daughter enrolled in Beaufort County Schools in August 1987. In October 1987, she went out of control and became violent, demolishing a certain amount of school property. With help from Tidelands Mental Health Center, Petitioner's daughter, Ginger, was committed to Brynn Marr Hospital in Jacksonville, North Carolina.

Ginger was moved directly from Brynn Marr to The Whitaker School in Butner, North Carolina on December 9, 1987. However, by late 1988, Ginger had not displayed psychotic type behaviors in over four months and The Whitaker School determined that her discharge was necessary. They convened a Community Planning Conference for January 5, 1989.

At the Community Planning Conference on January 5, 1989, the Principal of Bath High School in Beaufort County, North Carolina stated that returning Ginger to Bath High School would not be a good idea as Ginger's destruction of school property had made her very unpopular. Staff from The Whitaker School stated that a self-contained BEH class or day treatment would appropriately meet Ginger's needs in a less restrictive environment with group placement as a back-up. However, Rosa Beamon, Program Administrator for Exceptional Children, Beaufort County Schools, stated that Beaufort County Schools would only offer Homebound Services. The Superintendent of Beaufort County Schools later testified at the administrative hearing that the placement decision for Ginger Goforth had already been made at an Administrative Placement Committee meeting without parental input and before the School Based Committee met to develop an IEP.

On February 22, 1989, Ginger was discharged from The Whitaker School and returned to Beaufort County to live with her family.

On March 1, 1989, Beamon mailed out notices of a meeting of the School Based Committee to be held March 6, 1989 for the purpose of planning Ginger's placement. Janet Roach was unable to attend the meeting. At the March 6 meeting, it was again decided that Beaufort County Schools would suggest that Ginger could have only Homebound Services or some limited time at school. No Individual

Education Plan (IEP) was developed for Ginger at the meeting, nor had any IEP been developed previously by the Beaufort County Schools.

Another meeting was scheduled and held on March 27, 1989. Roach was present along with a representative from the North Carolina Governor's Advocacy Council for Persons with Disabilities. At the meeting, Beaufort County Schools began preparation of an IEP for Ginger but did not complete it nor advise Roach of her rights regarding education for children with special needs. Further, they did not retract their placement decision.

On April 10, 1989, after having secured short term funding from Tidelands Mental Health, Ginger was placed at NOVA, a private residential treatment center. On August 15, 1989, Tidelands Mental Health called a meeting to discuss the fact that the funding for Ginger's placement was about to run out. Beamon attended this meeting. Beamon stated that Beaufort County Schools program for Ginger would consist of a resource or full time BEH placement in Beaufort County Schools depending on Ginger's needs. This placement decision was also made before the development of an IEP for Ginger.

A petition for a contested case hearing was filed and Ginger remained at NOVA until the hearing was held in May 1990.

Beaufort County School officials consistently failed to develop an Individual Education Program needed to appropriately place Ginger Goforth before making a series of placement decisions. The school system also failed to give written notice containing its proposed placement with a full explanation of available procedural safeguards to Roach following her daughter's release from The Whitaker School.

REASON FOR GRANTING THE WRIT

Because the Decision Below Conflicts with *Board of Education v. Rowley* and Other Decisions of This Court, and Because the Intervening Decision of this Court in *Florence County School District Four v. Carter* is Directly Applicable to the Facts in this Case, the Court Should Grant Petitioner's Writ, Vacate the Decision Below, and Remand this Case to the Supreme Court of North Carolina for Reconsideration in Light of *Carter*.

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq*., formerly known as the Education for All Handicapped Children Act, then as the Education of the Handicapped Act, is the foundation for exceptional children's laws. It is the primary source in providing federal aid to reimburse state and local school systems for a portion of the cost of providing instructional and support services to children who are disabled. The centerpiece of this federal legislation is a state grant program which requires participating states, of which North Carolina is one, to

furnish to all children with disabilities a free appropriate public education in the least restrictive setting. "The 'free appropriate public education' required by the Act is tailored to the unique needs of the handicapped child by means of an 'individualized educational program' (IEP)." *Board of Education v. Rowley*, 458 U.S. 176, 181 (1982).

An IEP is a specially designed program, developed to meet the unique needs of the disabled child, including both instruction in the most appropriate setting as well as all necessary related services. Both the instruction and services are to be provided at no cost to the parents

Also required under IDEA are procedural due process safeguards in evaluations, appropriate needs, placement decisions, hearings, and appeals, as well as safeguards for student records related to the entire process. Thus, for state and local education agencies, IDEA is both a source of funds and a source of obligation, guaranteeing parents and guardians of children with disabilities the right to secure a free appropriate public education through both administrative and judicial remedies. 20 U.S.C. § 1412(b)(2), (e)(4).

These same entitlements to a free appropriate public education and all related services are further set out in Article 9 of Chapter 115C of the North Carolina General Statutes and the administrative rules and regulations promulgated pursuant to that statute by the North Carolina Department of Public Instruction. N.C. Admin. Code tit. 16 r. 06H.0001. These

rules incorporate by reference the federal definition of "free appropriate public education," which reads as follows:

> As used in this part, the term "free appropriate public education "means special education and related services that—
>
> (a) Are provided at public expense, under public supervision and direction, and without charge;
>
> (b) Meet the standards of the SEA [State Educational Agency], including the requirements of the part;
>
> (c) Include preschool, elementary school, or secondary school education in the State involved;
>
> (d) Are provided in conformity with an IEP that meets the requirements of Secs. 300.340- 300.350.

34 C.F.R. § 300.8; *see* N.C. Admin Code tit. 16 r. 6H.0001(2). Sections 300.340-300.350 discuss in detail the procedural requirements of the IEP process including the SEA's responsibilities, who should participate in IEP meetings, parent participation and IEP content. 34 C.F.R. § 300.340-300.350. (App., *infra*, 58a-65a.) The North Carolina Department of Public Instruction publishes a document entitled "Procedures Governing Programs and Services for Children with Special Needs." Formerly part of the Administrative Code, these Procedures provide additional guidance for school districts in the provision of services for special needs children. These Procedures are consistent with the federal regulations.

It is well settled that failure to adhere to the procedural requirements of IDEA constitutes a failure to provide a free appropriate public education. *See Dellmuth v. Muth*, 491 U.S. 223 (1989); *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); *Board of Education v. Rowley*, 458 U.S. 176 (1982); *Spielburg v. Henrico County Public Schools*, 853 F.2d 256 (4th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989); *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985). Developing an IEP is one of the central procedural requirements of IDEA since the IEP drives the nature of and location of educational service delivery. *See Honig v. Doe*, 484 U.S. 305, 311 (1988) (IEP is "primary vehicle" for implementing IDEA). Without an IEP there can be no free appropriate public education.

"[T]he importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 205-06. In the present case, the state Court of Appeals' determination that "[t]he failure to fully develop an IEP does not necessarily constitute a failure to provide a free appropriate education under the statute or the EHCA," is insupportable. *Roach*, 443 S.E.2d at 343 (App., *infra*, 15a).

In discounting the importance of the procedural safeguards afforded by IDEA, the Court of Appeals pinned its decision on the finding that, "[t]he process for providing Ginger with a free appropriate education was . . . interrupted by [her mother]'s act of placing Ginger into another school." *Roach*, 443 S.E.2d at 344 (App., *infra*, 19a). The court continued that "the precipitating factor that led to a breakdown of [Beaufort County Schools] following the procedure outlined by Article 9 and the federal regulations for the [IDEA] for providing Ginger with a free appropriate education was petitioner's own act of placing Ginger into another school system." *Id.* at 344 (App., *infra*, 20a). Once again, the Court of Appeals' conclusion is contrary this Court's decisions.

The issue of private placement has been recently addressed by this Court in the intervening case of *Florence County School District Four v. Carter*, --- U.S. ---, 114 S. Ct. 361 (1993). The Court said in *Carter*, "'when a public school system ha[s] defaulted on its obligations under the Act, a private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits."'" *Id.* at 364 (quoting *Florence County School District Four v. Carter*, 950 F.2d 156, 163 (4th Cir. 1991)). This Court further held that, "Congress intended that IDEA's promise of a 'free appropriate public education' for disabled children would normally be met by an IEP's provision for education in the regular public schools or in private schools chosen jointly by school officials and parents." *Id.* at 364.

The North Carolina Court of Appeals acknowledged that Beaufort County Schools failure to develop an IEP was inappropriate under IDEA. *Roach*, 443 at 343 (App., *infra*, 15a). Thus, under *Carter*, the parents' decision to place the child in a private placement that was able to meet the child's needs is *not* dispositive of the case as held by the North Carolina Court of Appeals.

It is the holding of this Court that in order to be entitled to relief under IDEA, parents need only show that the public school placement was inappropriate and that the private school placement complied with minimal standards of appropriateness. In this case, the school system completely failed to develop any IEP thus negating any meaningful placement, and the parent placed the child in an appropriate residential setting. *Roach*, 443 at 343 (App., *infra*, 15a). Clearly Petitioner is entitled to relief under the IDEA.

The *Carter* case was handed down by this Court after briefs were filed and the case was argued in the state Court of Appeals. Counsel for Petitioner did not advise the state court of this intervening decision and it is clear from the Court of Appeals' ruling that the court was unaware of this intervening decision.

The practical effect of the state court's decision is that it opens the door for school systems in North Carolina to ignore the central procedural requirement of the Individuals with Disabilities Education Act, the IEP. Allowing this

decision to stand uncorrected would invite other state jurisdictions to defy this Court's precedent in a similar manner. Congress intended that all children with disabilities be provided a free appropriate public education.

From time to time, this Court has found it necessary to address certain issues on a state by state basis. One example is the issue of desegregation. *Alexander v. Holmes County*, 396 U.S. 19, *reh'g denied*, 396 U.S. 976 (1969); *Green v. County School Board*, 391 U.S. 430 (1968); *Rogers v. Paul*, 382 U.S. 198 (1965); *Bradley v. School Board*, 382 U.S. 103 (1965); *Cooper v. Aaron*, 358 U.S. 1 (1958). Similarly, there is now a need for this Court to address the issue of educating children with disabilities and send a clear message to the states that failure to adhere to the procedural requirements of IDEA will not be tolerated.

It is notable that in drafting its opinion, the state Court of Appeals relied upon no case law for guidance despite the fact that there is a vast body of federal law on the subject. The state Court of Appeals' conclusions clearly defy the precedents set by current United States Supreme Court case law. Because the Court of Appeals' ruling in this case conflicts with prior United States Supreme Court case law and because an intervening decision of this Court has settled the matter as applied to the facts in this case, petitioner respectfully requests this Court grant her petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted, or in the alternative, the petition should be granted and the case vacated and remanded for a decision consistent with *Florence County School District Four v. Carter*, 114 S. Ct. 361 (1993).

Respectfully submitted,

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September 14th, 1994.

APPENDIX

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No. 201P94 **SECOND DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

Beaufort County Schools	**From NC Court of Appeals**
v	**(922SC1117)**
Janet Roach	**From Beaufort**
	(90CVS721)

****

ORDER

Upon consideration of the petition filed by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> **"Denied by order of the Court in conference, this the 16th day of June 1994**
>
> **s/Parker, J.**
> **For the Court"**

ORDER OF THE SUPREME COURT OF NORTH CAROLINA CONTINUED . . .

WITNESS my hand and seal of the Supreme Court of North Carolina, this the 23rd day of June 1994.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

s/Marvea J. Francis
Marvea J. Francis
Assistant Clerk

Copy to:
North Carolina Court of Appeals
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NO. 922SC1117

NORTH CAROLINA COURT OF APPEALS

Filed: 19 April 1994

BEAUFORT COUNTY SCHOOLS
Appellee

v. **Beaufort County**
No. 90 CVS 721

JANET ROACH
Appellant

Appeal by Petitioner Janet Roach from order entered 8 May 1992 by Judge W. Russell Duke, Jr. in Beaufort County Superior County Superior Court. Heard in the Court of Appeals 6 October 1993.

On 26 September 1989, Petitioner Janet Roach filed a petition for a contested case hearing in the Office of Administrative Hearings against Respondent Beaufort County Schools ("BCS") alleging that Beaufort County Schools had "failed to provide a free appropriate public education for [her] daughter, Ginger Goforth" pursuant to Article 9 of Chapter 115C of the North Carolina General Statutes. Following a hearing, the Administrative Law Judge on 25 July 1990 filed his recommended decision finding that BCS had "not properly offered or provided an appropriate education for Ginger" and ordered BCS to provide Ginger Goforth with an appropriate education and reimburse petitioner for reasonable private placement costs from 22 February 1989 until the time BCS

OPINION OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

provides such education. On 26 September 1990, the State Board of Education, which was the agency given the authority to make the final decision in an action brought pursuant to N.C. Gen. Stat. § 115C-116 and Article 3 of Chapter 150B prior to 1 October 1990, filed its final decision in this action adopting the findings of fact and conclusions of law made by the administrative law judge in his recommended decision.

BCS filed a petition for judicial review of this decision in Beaufort County Superior Court pursuant to Article 4 of Chapter 150B. After making additional findings of fact, on 8 May 1992, Judge W. Russell Duke, Jr. entered an order reversing the decision of the State Board of Education. From this order, petitioner appeals.

Lee E. Knott, Jr. for appellee Beaufort County Schools.

Governor's Advocacy Council for Persons with Disabilities, by Judy J. Burke, Augustus B. Elkins, II and Barbara A. Jackson, for appellant.

ORR, Judge.

The issue presented by this appeal is whether the trial court erred in reversing the decision of the State Board of Education concluding that BCS failed to provide a free appropriate education for petitioner's daughter, Ginger

OPINION OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

Goforth, who is a behaviorally-emotionally handicapped ("BEH") child.

This case was first heard by an Administrative Law Judge ("ALJ") who made the following findings of fact: In August of 1987, Ginger Goforth was enrolled in the BCS system at Bath High School and placed in a self-contained BEH class. In October of 1987, following a violent episode, petitioner committed Ginger to Brynn Marr Hospital with the help of the Tideland Mental Health Center. On 9 December 1987, Ginger was moved directly from Brynn Marr to The Whitaker School, a school in Granville County for children who exhibit behavior that could be considered dangerous to themselves or others. In late 1988, The Whitaker School determined that Ginger's discharge was necessary and convened a community planning conference for 5 January 1989.

The principal of Bath High School and the Program Administrator for Exceptional Children Programs of BCS, Rosa Beamon, both attended this meeting. At this meeting, the principal expressed his opinion that because of Ginger's previous violent behavior at Bath High School in 1987, it would not be a good idea to return her to this school. Beamon stated that BCS could provide homebound services for Ginger. A teacher and a unit supervisor of The Whitaker School

expressed their opinions, however, that a self-contained BEH class or day treatment, with group placement as a back-up, would be a less restrictive way to meet Ginger's needs.

On 22 February 1989, The Whitaker School discharged Ginger, and she returned to Beaufort County. On 1 March 1989, Rosa Beamon mailed out notices of a meeting of the School Based Committee to be held 6 March 1989 for the purpose of planning Ginger's placement. Although informed of this meeting, petitioner did not attend.

At this meeting, "[i]t was decided by those present that when and if the Petitioner contacted the school to enroll Ginger that it be suggested that she have Homebound Services or limited time at school with a teacher assistant and much support from the Tideland Mental Health Center. No [Individualized Educational Program ("IEP")] for Ginger was developed at this meeting." On 27 March 1989, the School Based Committee held another meeting.

The petitioner appeared at this meeting along with a representative from The Governor's Advocacy Council, and petitioner "was advised that a teacher assistant had been employed by [BCS] to work with Ginger on her return to Bath High School in a BEH self-contained classroom setting."

OPINION OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

Petitioner stated that she did not want Ginger at home. Also at this meeting, BCS began preparing an IEP for Ginger.

During this process, on 10 April 1989, without giving prior notice to BCS, petitioner placed Ginger in NOVA, a private residential treatment center in Lenoir County. At NOVA, Ginger's teacher was provided by the Lenoir County Schools. BCS did not thereafter complete the IEP.

Subsequently, funding by Tideland Mental Health Center for Ginger to Attend NOVA was to run through September, 1989, and on 15 August 1989, the Tideland Mental Health Center called a meeting to discuss the fact that funding for Ginger's placement at NOVA was ending. Rosa Beamon and Dan Winslow, School Psychologist for BCS, attended this meeting. At the meeting, Beamon reported that BCS could provide education but not treatment for Ginger. She stated that BCS' program would consist of a resource or full-time BEH placement depending on Ginger's need and a full-time teacher assistant at Northside High School. As found by the ALJ, "[s]hortly after this meeting the petition for a contested case hearing was filed[,] and Ginger has remained at NOVA."

Based on these facts, the ALJ concluded that BCS failed to provide a free appropriate education for Ginger Goforth "by not fully developing an IEP and presenting it in

writing to Petitioner along with her procedural rights and safeguards as required" and recommended that BCS provide an appropriate education for Ginger and "reimburse Petitioner for reasonable private placement costs from February 22, 1989, until it does so." Subsequently, the State Board of Education adopted the findings and conclusions of the ALJ.

On petition for judicial review, the trial court found, however, that BCS "had no legal obligation to fully develope [sic] an IEP for Ginger Goforth and present it to the [petitioner] along with her procedural rights and safeguards", that there was "no substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted within the meaning of G.S. 150B-51(b)(5) to support a finding of fact that [BCS had] not properly offered or provided an appropriate education for Ginger Goforth", and reversed the Board's decision. On appeal, petitioner contends that the trial court erred in its finding that BCS was under no legal obligation to fully develop an IEP for Ginger and present it to petitioner and that the trial court exceeded its scope of review by making additional findings of fact not contained in the final decision of the Board and reversing the Board's decision.

Our standard of review over an agency's decision is governed by N.C. Gen. Stat. § 150B-51(b), "the same scope of

review utilized by superior courts." *Clay v. Employment Security Commission of N.C.*, 111 N.C. App. 599, 602, 432 S.E.2d 873, 875 (1993), *disc. review allowed*, 335 N.C. 553, ___ S.E.2d ___ (1994); *Jarrett v. N.C. Dep't of Cultural Resources,* 101 N.C. App. 475, 478, 400 S.E.2d 66, 68 (1991).

Under N.C. Gen. Stat. § 150B-51(b) (1991), a court may "reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced . . . ." Petitioner's rights may have been prejudiced under the statute if the agency's findings, inferences, conclusions, or decisions are:

> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30or 150B-31 in view of the entire record assubmitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b) (1991).

"Agency findings of fact are conclusive if, upon review of the whole record, they are supported by competent, material, and substantial evidence." *In re Humana Hosp. Corp. v. North Carolina Dep't of Human Resources*, 81 N.C.

App. 628, 633, 345 S.E.2d 235, 238 (1986). "[T]he Superior Court is without authority to make findings at variance with the findings of the [agency] when the findings of the [agency] are supported by competent, material and substantial evidence." *In re Appeal of Amp, Inc.*, 287 N.C. 547, 561, 215 S.E.2d 752, 761 (1975). However, "[w]here the reviewing court determines that the findings of the agency are not supported by substantial evidence, the [C]ourt may make findings at variance with those of the agency." *Scroggs v. North Carolina Criminal Justice Educ. and Training Standards Comm'n,* 101 N.C. App. 699, 702-03, 400 S.E.2d 742, 745 (1991).

First we must determine whether the trial court erred in finding that BCS was under no legal obligation to fully develop an IEP for Ginger. The federal "Education for All Handicapped Children Act of 1975" (the "EHCA"), 20 U.S.C. § 1400. et seq., which Act is now entitled "Individuals with Disabilities Education Act," was enacted to promote the education of children with special needs. Specifically, the EHCA creates a state grant program to aid states in educating handicapped children. The EHCA requires all states receiving funds under this Act to provide a "free appropriate public education" for all children with disabilities in the state. 20 U.S.C. § 1412.

OPINION OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

North Carolina receives funds under the EHCA and is, therefore, required to provide a free appropriate public education to children with disabilities living in the State. Article 9 of Chapter 115C of the North Carolina General Statutes ("Article 9") establishes policies in accordance with the EHCA to provide this education. Article 9 states, "[e]ach local educational agency shall provide free appropriate special education and related services in accordance with the provisions of this Article for all children with special needs who are residents of, or whose parents or guardians are residents of, the agency's district, beginning with children aged five." N.C. Gen. Stat. § 115C-110(i).

In the present case, the issue before us is whether the trial court erred in reversing the Board's decision that BCS failed to provide Ginger with a free appropriate education since her release from The Whitaker School on 22 February 1989.

On 22 February 1989, N.C. Gen. Stat. § 115C-113(c) (1987) stated that once a child is referred for diagnosis and evaluation,

> [w]ithin 30 days of such referral, the local educational agency shall send a written notice to the parents or guardian describing the evaluation

> procedure to be followed and requesting consent for the evaluation. If the parents or guardian consent, the diagnosis and evaluation may be undertaken, if they do not, the local educational agency may obtain a due process hearing on the failure of the parent to consent under G.S. 115C-116.
>
> The local educational agency shall provide or cause to be provided a diagnosis and evaluation appropriate to the needs of the child within 30 calendar days after sending the notice unless the parents or guardian have objected to such evaluation. At the end of such diagnosis and evaluation, the local education agency shall offer a proposal for an educational program appropriate to the child's needs. If this proposal calls for a special educational program, it shall set forth the specific benefits expected from such a program, a method for monitoring the benefits, and a statement regarding conditions which will be considered indicative of the child's readiness for participation in regular classes.

OPINION OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

Further, at the time of Ginger's release from The Whitaker School, N.C. Gen. Stat. § 115C-113(f) (1987) stated:

> Each local education agency shall prepare individualized educational programs for all children found to be children with special needs . . . . The individualized educational program shall be developed in conformity with Public Law 94-142 and the implementing regulations issued by the United States Department of Education and shall be implemented in conformity with timeliness set by that Department.

Public-Law 94-142 was codified into the EHCA. At the time of Ginger's release from The Whitaker School, the federal regulations for the EHCA pertaining to the preparation and implementation of an IEP stated:

> (b) An individualized education program must:
> (1) Be in effect before special education and related services are provided to a child; and
> (2) Be implemented as soon as possible following the meetings under § 300.343.

34 C.F.R. § 300.342(b). Under 34 C.F.R. § 300.343, "[e]ach public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's [IEP]." 34 C.F.R. § 300.343(a). "[A] meeting must be held within thirty calendar days of a determination that the child needs special education and related services." 34 C.F.R. § 300.343 (c).

"Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including: "notifying parents of the meeting and scheduling meetings at a mutually agreed upon time and place. 34 C.F.R. § 300.345(a). "A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend." 34 C.F.R. § 300.345(d). Further, "[t]he public agency shall give the parent, on request, a copy of the [IEP]." 34 C.F.R. § 300.345(f); *See also* N.C. Gen. Stat. § 225C-113(d) (1987) ("local educational agency shall furnish the results, findings, and proposals based on the diagnosis and evaluation to the parents or guardian in writing . . . .").

Our review of the applicable provisions of Article 9 and the EHCA and its regulations in effect at the time of Ginger's release from The Whitaker School shows no

provision whereby a local educational agency is relieved of its duty to create an IEP for a child whose parents reside in the agency's district once that child has been determined to be a child with special needs. In the present case, it is undisputed that BCS is a "local educational agency" and that petitioner, the parent of Ginger, is a resident of BCS' district. It is also undisputed that at the time of Ginger's release from The Whitaker School on 22 February 1989, Ginger had been determined to be a child with special needs. Thus, based on our reading of the statute and federal regulations, BCS had a legal obligation to fully develop an IEP for Ginger following her release from The Whitaker School, to present the IEP to petitioner upon petitioner's request, and to present BCS's proposals in writing to petitioner, regardless of petitioner's request; the trial court erred, therefore, in its finding that BCS was under no legal obligation to do so.

The determination that BCS had a duty to fully develop an IEP for Ginger and that BCS failed to do so is not, however, dispositive of this case. The failure to fully develop an IEP does not necessarily constitute a failure to provide a free appropriate education under the statute or the EHCA.

The facts of this case as found by the ALJ and adopted by the Board show that Ginger was released from The Whitaker School on 22 February 1989. The Board found that

before the expiration of thirty days, on 1 March 1989, BCS informed petitioner that it was going to hold a meeting on 6 March 1989 to determine Ginger's educational needs; petitioner chose, however, not to attend. Then on 27 March 1989, BCS held another meeting which petitioner did attend. At this meeting, BCS began to create an IEP for Ginger with petitioner. Before BCS completed the IEP, however, on 10 April 1989, petitioner chose to enroll Ginger in NOVA, a private residential treatment center in Kinston, N.C., where, according to the evidence, Lenoir County School System developed an IEP for Ginger, and BCS, therefore, stopped preparing an IEP for her. Petitioner's act of placing Ginger in NOVA effectively prevented BCS from implementing an IEP for Ginger "as soon as possible."

Subsequently, on 15 August 1989, Tideland Mental Health Center called a meeting to discuss the fact that Ginger's funding at NOVA was running out. At this time, N. C. Gen. Stat. § 115C-113(c) had been amended effective 21 June 1989, which provision is still in effect and states that once a child is referred for diagnosis and evaluation,

> [t]he local educational agency shall provide or cause to be provided, as soon as possible after receiving consent for evaluation, a diagnosis and evaluation appropriate to the

> needs of the child unless the parents or guardian have objected to such evaluation. If at the conclusion of the evaluation, the child is determined to be a child with special needs, the local educational agency shall within 30 calendar days convene an [IEP] committee. The purpose of the meeting shall be to propose the special education and related services for the child. . . . The proposal shall set forth the specific benefits expected from such a program, a method for monitoring the benefits, and a statement regarding conditions which will be considered indicative of the child's readiness for participation in regular classes.
>
> After an initial referral is made, the provision of special education and related services shall be implemented within 90 calendar days to eligible students, unless the parents or guardian refuse to consent to evaluation or placement or the parent or local educational agency requests a due process hearing.

Further, N.C. Gen. Stat. § 115C-113(d) was amended effective 21 June 1989, which provision is still in effect, and states,

OPINION OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

> [t]he local educational agency shall furnish the results, findings, and proposals, as described in the [IEP] or group educational program based on the diagnosis and evaluation to the parents or guardian in writing . . . prior to the parent or guardian giving consent for initial placement in special education and related services.

In the present case, as found by the Board, Rosa Beamon and a School Psychologist for BCS were invited to and attended the meeting of 15 August 1989 called by Tideland Mental Health Center. When asked what type of education BCS could provide for Ginger, Beamon stated that "the Beaufort County Schools program would consist of a resource or full-time BEH placement *depending on Ginger's need* and a full-time teacher assistant at Northside High School." (Emphasis added.) "Shortly after this meeting the petition for a contested case hearing [in which petitioner alleged that BCS had failed to provide a free appropriate public education for Ginger] was filed and Ginger has remained at NOVA."

Our review of the amendments to Article 9 again shows no provision whereby a local educational agency is relieved of its duty to create an IEP for a child whose parents reside in the agency's district once that child has been

determined to be a child with special needs. Thus, BCS was still under the obligation to fully develop an IEP for Ginger but with additional time constraints.

Under Article 9 as amended, once a child has been referred for a diagnosis and evaluation, the local educational agency shall, "as soon as possible after receiving consent for evaluation," provide or cause to be provided a diagnosis and evaluation of the child. N.C. Gen. Stat. § 115C-113(c) (1991). If the child is determined to be a child with special needs, the local educational agency is to convene an IEP committee within thirty calendar days after such determination. N.C. Gen. Stat. § 115C-113(c) (1991). The local educational agency is to develop an IEP, furnish the results as described in the IEP to the child's parent or guardian in writing, and implement the special education and related services within ninety calendar days from the initial referral. N.C. Gen. Stat. § 115C-113(c), (d) and (f) (1991).

Our review of the evidence shows that BCS followed the correct procedure to provide Ginger with a free appropriate education upon her release from The Whitaker School. The process for providing Ginger with a free appropriate education was, however, interrupted by petitioner's act of placing Ginger into another school. Further, at the time Tideland Mental Health Center called the meeting to discuss the fact the

Ginger's funding to attend NOVA was ending, Ginger was still enrolled at NOVA as a student, and the Board made no findings as to whether petitioner contacted BCS again after this meeting before filing this action.

Based on these facts; we conclude that there is no evidence to support a finding or conclusion that BCS failed to provide a free appropriate education. Although the record reveals subsequent discussion among the parties as funding for NOVA ran out, it is not clear from the record or issues presented that any subsequent acts of BCS constituted a failure to provide a free appropriate education.

Thus, the precipitating factor that led to a breakdown of BCS following the procedure outlined by Article 9 and the federal regulations for the EHCA for providing Ginger with a free appropriate education was petitioner's own act of placing Ginger into another school system. Based on our review of the facts as found by the Board and as supported by sufficient and competent evidence, we conclude that insufficient evidence exists to support the Board's conclusion that BCS failed to provide a free appropriate education for Ginger.

Accordingly, insofar as the trial court reversed the Board's conclusion that BCS failed to provide a free appropriate education for Ginger, we affirm the order of the

OPINION OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

trial court. Insofar as the trial court concluded that BCS was under no legal obligation to prepare an IEP for Ginger and present it to petitioner, however, we reverse the order of the trial court and remand this case for entry of an order requiring BCS to prepare an IEP for Ginger, to present the results of the IEP to petitioner pursuant to the provisions of Article 9, and to implement that IEP within 90 calendar days absent one of the factors listed in G.S. 115C-113(c) taking place.

Affirmed in part, reversed and remanded in part.

Judges EAGLES and GREENE concur.

By s/Doris P. Cole
Deputy Clerk
4-19-94

NO. 922SC1117

NORTH CAROLINA COURT OF APPEALS

BEAUFORT COUNTY SCHOOLS
Appellee

v.

Beaufort County
No. 90CVS721

JANET ROACH
Appellant

ORDER

IT IS HEREBY ORDERED that the opinion filed in this case on 15 February 1994 be withdrawn. The Clerk of the Court of Appeals is hereby directed not to certify said opinion. This cause is retained by this Court for disposition by the panel to which it is assigned.

This the 18th day of February, 1994

s/Robert F. Orr
For the Court

Panel consisting of:
Eagles, Orr and Greeene, JJ

ORDER OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

The foregoing order is therefore certified to the attorneys listed below. Witness my hand and official seal this the 18 day of February, 1994.

s/John H. Connell
Clerk

cc: Judy J. Burke
Augustus B. Elkins II
Barbara A. Jackson
Lee E. Knott, Jr.

NO. 922SC1117

NORTH CAROLINA COURT OF APPEALS

Filed: 15 February 1994

BEAUFORT COUNTY SCHOOLS
Appellee

v. **Beaufort County**
No. 90 CVS 721

JANET ROACH
Appellant

Appeal by Petitioner Janet Roach from order entered 8 May 1992 by Judge W. Russell Duke, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 6 October County 1993.

On 26 September 1989, Petitioner Janet Roach filed a petition for a contested case hearing in the Office of Administrative Hearings against Beaufort County Schools ("BCS") alleging that BCS had "failed to provide a free appropriate public education for [her] daughter, Ginger Goforth" pursuant to Article 9 of Chapter 115C of the North Carolina General Statutes. Following a hearing, on 25 July 1990, the administrative law judge filed a "Recommended Decision" finding that BCS had "not properly offered or provided an appropriate education for Ginger", recommending that BCS provide Ginger Goforth with an appropriate education and reimburse petitioner for reasonable private placement costs from 22 February 1989 until the time BCS

provides such education, and notifying the parties that the State Board of Education would make the final decision.

BCS filed exceptions and argument to the recommended decision of the administrative law judge with the State Board of Education, and on 26 September 1990, the Board filed its "Final Decision" in this action adopting the findings of fact and conclusions of law in the recommended decision.

BCS filed a petition for judicial review of this decision in Beaufort County Superior Court. After making additional findings of fact, on 8 May 1992, Judge W. Russell Duke, Jr. entered an order reversing the decision of the State Board of Education. From this order, petitioner appeals.

Lee E. Knott, Jr. for appellee Beaufort County Schools

Governor's Advocacy Council for Persons with Disabilities, by Judy J. Burke, Augustus B. Elkins, II and Barbara A. Jackson, for appellant.

ORR, Judge

The substantive issue presented by this appeal is whether the trial court erred in reversing the decision of the

State Board of Education which concluded that BCS failed to provide a free appropriate education for petitioner's daughter, who is a behaviorally-emotionally handicapped child. We do not reach this issue, however, as this case was improperly before both the State Board of Education and the trial court.

This action began when petitioner filed a petition for a contested case hearing in the Office of Administrative hearings (the "OAH") alleging that BCS has "failed to provide a free appropriate public education for [her] daughter" as required by Article 9 of Chapter 115C of the North Carolina General Statutes. Thus, the first question raised by this appeal is whether petitioner had a right to file a petition for a contested case hearing in the OAH.

Article 3 of Chapter 150B of the North Carolina General Statutes prescribes the procedure for filing a contested case hearing with the OAH. *See* N.C. Gen. Stat. § 150B-23. Article 3 of Chapter 150B does not, however, determine jurisdiction of the OAH over contested cases. Instead, our Supreme Court held in *Batten v. N.C. Dep't of Correction*, 326 N.C. 338, 389 S.E.2d 35 (1990), that OAH jurisdiction over appeals derives not from Chapter 150B but from the statute which is the basis for the claim. As stated by the Supreme Court, "[t]he administrative hearing provisions of Article 3, Chapter 150B, do not establish the right of a person 'aggrieved'

by agency action to OAH review of that action, but only describe the procedures for such review." *Id.* at 342-43, 389 S.E.2d at 38.

Recently, this Court followed *Batten* in *Citizens For Clean Industry, Inc. v. Lofton,* 109 N.C. App. 229, 427 S.E.2d 120 (1993) wherein this Court looked to the statute petitioner was suing the agency under to determine whether the OAH had jurisdiction over the action and petitioner had the right to proceed under Article 3 of Chapter 150B. In *Citizens For Clean Industry, Inc.,* petitioner, Citizens For Clean Industry, Inc. ("CCI"), filed a petition for a contested case hearing seeking a hearing concerning matters related to the issuance of a National Pollutant Discharge Elimination System ("NPDES) permit to Carolina Food Processors, Inc. ("CFP"). The NPDES permit allowed CFP to discharge water from a waste water treatment plant into the Cape Fear River.

In determining whether CCI had a right to an administrative hearing concerning the issuance of the NPDES permit, this Court looked to the language of the NPDES permitting statute, N.C. Gen. Stat. § 143-215.1. Citing to *Batten* this Court held, "Because N.C. Gen Stat. § 143-215.1(e) does not grant third parties the right to commence a contested case hearing under Article 3 of Chapter 150B, petitioners have no right to seek that particular relief."

OPINION OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

Citizens For Clean Industry, Inc., 109 N.C. App. at 234, 427 S.E.2d at 123.

As previously noted, petitioner here filed her contested case hearing alleging that BCS failed to provide her daughter with a free appropriate public education as required by Article 9 of Chapter 115C ("Article 9"). Thus, we must look to the provisions of Article 9 to determine whether petitioner had the right to file a petition for a contested case hearing in the OAH. N.C. Gen. Stat. § 115C-116 governs the right to appeal under Article 9.

N.C. Gen. Stat. § 115C-116 (1991 & Supp. 1993) states:

> (d) Administrative Review. -- Except as otherwise provided in this section, the administrative review shall be initiated and conducted in accordance with Article 3 of Chapter 150B of the General Statutes, the Administrative Procedure Act.
>
> (e) Scope of Review. -- The issues for review shall be limited to those set forth in subsection (c).

OPINION OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

Subsection (c) states:

> (c) Right of Review. -- The parent, guardian, or surrogate parent may obtain review of proposed decision on the following grounds:
>
> (1) The child has not been identified or has been incorrectly identified as a child with special needs;
>
> (2) The child's individualized education plan is not appropriate to meet his needs;
>
> (3) The child's individualized education plan is not being implemented; or
>
> (4) The child is otherwise being denied a free, appropriate education.

Thus, a "parent, guardian, or surrogate parent" of a child with special needs has the right to file a petition for a contested case hearing in the OAH based on one of the four grounds listed in N.C. Gen. Stat. § 115C-116(c).

In the present case, petitioner is the parent of a child with special needs, and she filed a petition for a contested case

hearing in the OAH alleging that BCS failed to provide her child with a free appropriate public education. Petitioner based her allegation on the fact that BCS failed to fully develop an individualized education program for her daughter. Thus, petitioner had the right to file her petition for a contested case hearing pursuant to N.C. Gen. Stat. § 115C-116(c)(4), (d), and (e), and petitioner correctly filed her petition for a contested case hearing in the OAH.

Next, we must determine whether this case proceeded along the proper path for administrative review and appeal. N.C. Gen. Stat. § 115C-116(d) states that *[e]xcept as otherwise provided,"* the administrative review of cases brought under this statute shall be initiated and conducted in accordance with Article 3 of Chapter 150B. (Emphasis added.) Under Article 3 of Chapter 150B, once the petitioner files her petition for a contested case hearing in the OAH, an administrative law judge ("ALJ") conducts a hearing of the case and makes findings of facts and conclusions of law and files a decision. N.C. Gen. Stat. §§ 150B-23, -34.

After the ALJ makes findings of facts and conclusions of law, however, N.C. Gen. Stat. § 115C-116(h) provides a procedure for the ALJ to follow different from the procedure outlines in Article 3 of Chapter 150B in cases filed in the OAH

pursuant to N.C. Gen. Stat. § 115C-116. Further, N.C. Gen. Stat. § 115C-116(h), (i), and (k) provide a different procedure for parties to follow in appealing the ALJ's decision from the procedure outlined in Chapter 150B in such cases.

N.C. Gen. Stat. § 115C-116(h) (Supp. 1993) states:

> (h) Decision of the Administrative Law Judge. -- Following the hearing, the administrative law judge shall make a decision regarding the issues set forth in subsection (c). The decision shall contain findings of fact and conclusions of law. Notwithstanding the provisions of Chapter 150B of the General Statutes, the decision of the administrative law judge becomes final and not subject to further review unless appealed to the Review Officer as provided in subsection (i). A copy of the administrative law judge's decision shall be served upon each party and a copy shall be furnished to the attorneys of record. The written notice shall contain a statement informing the parties of the availability of appeal and the 30-day limitations period for appeal as set forth in subsection (i).

(Emphasis added.)

OPINION OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

Thus, in a contested case filed in the OAH pursuant to the right to file a petition for a contested case derived from N.C. Gen. Stat. § 115C-116, the decision filed by the ALJ containing his findings of fact and conclusions of law is final, not recommended, and not subject to further review unless appealed to the Review Officer. N.C. Gen. Stat. § 115C-116(h). Further, the ALJ must give written notice to each party informing the parties of the availability of appeal and the 30-day limitations period for appeal as set forth in subsection (i).

N.C. Gen. Stat. § 115C-116(i) (1991 & Supp. 1993) prescribes the procedure for appealing the ALJ's decision to the Review Officer.

> (i) Review by Review Officer. -- Any party aggrieved by the decision of the administrative law judge may appeal that decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the Superintendent of Public Instruction. The State Superintendent of Public Instruction shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. . . .

OPINION OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

> . . . The decision of the Review Officer shall contain findings of fact and conclusions of law and becomes final unless an aggrieved party brings a civil action pursuant to subsection (k). A copy of the decision shall be served upon each party and a copy shall be furnished to the attorneys of record. The written notice shall contain a statement informing the parties of the right to file a civil action and the 30-day limitations period for filing a civil action pursuant to subsection (k).

Thus, in order to appeal the ALJ's decision, an aggrieved party may file a written notice of appeal with the Superintendent of Public Instruction within 30 days after receipt of notice of the decision. The Superintendent will then appoint a Review Officer to hear the Case. After hearing the case, the Review Officer will enter a decision containing findings of facts and conclusions of law. Further, the Review Officer must notify the parties of their right to file a civil action. The decision of the Review Officer becomes final unless an aggrieved party brings a civil action pursuant to subsection (k).

N. C. Gen. Stat. § 115C-116(k) (1991) states:

> (k) Right to File Civil Action. - - Any party aggrieved by the decision of the Review Officer may institute a civil action in State or federal court as provided in 20 U.S.C. § 1415 within 30 days after receipt of notice of the decision.

As to cases filed on or after 5 July 1993, N.C. Gen. Stat. § 115C-116(k) (Supp. 1993) states:

> (k) Right to File Civil Action. - - Any party aggrieved by the decision of the Review Officer may institute a civil action in State court within 30 days after receipt of the notice of the decision or in federal court as provided in 20 U. S. C. § 1415.

In the present case, petitioner correctly filed her petition for a contested case hearing in the OAH; administrative review and appeal of this case was not, however, conducted according to the provisions of G. S. § 115C-116. Instead, this case has proceeded along the path of administrative review and appeal in accordance with the provisions of Article 3 of Chapter 150B.

Unlike under the provisions of G.S. § 115C-116, under the provisions of Article 3 of Chapter 150B, the decision filed by the ALJ is a "recommended decision" to the State agency in

charge of the particular case, not a final decision, except in specific instances outlines in N.C. Gen. Stat. § 150B-36(c). Further, under Article 3 of Chapter 150B, after the ALJ files his recommended decision, the State agency who is to make the final decision gives each party an opportunity to file exceptions to the decision recommended by the ALJ and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

After giving the parties time to file these exceptions and arguments and after reviewing the official record, the State agency files a final decision including findings of fact and conclusions of law. N.C. Gen. Stat. § 150B-36(b). Once the State agency files its final decision, a person aggrieved by the final decision and "who has exhausted all administrative remedies made available to him by statute or agency rule" may seek judicial review of this decision pursuant to Article 4 of Chapter 150B "unless adequate procedure for judicial review is provided by another statute. . . ." N.C. Gen. Stat. § 150B-43. Such aggrieved party may seek judicial review of the agency's final decision by filing a petition in the "Superior Court of Wake County or in the superior court of the county where the person resides." N.C. Gen Stat. § 150B-45.

In the present case, after holding a contested case hearing, the ALJ filed a "Recommended Decision" to the State

OPINION OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

Board of Education in favor of petitioner. The ALJ's decision contained the following notice to the parties:

NOTICE

> The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a)
>
> The Agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.
>
> The agency that will make the final decision in this contested case is the State Board of Education.

(Emphasis in original.) Thereafter, BCS filed exceptions and arguments to the ALJ's decision with the State Board of Education.

OPINION OF THE COURT OF APPEALS OF NORTH CAROLINA CONTINUED . . .

After reviewing the record, the State Board of Education filed a "Final Decision" adopting the findings of fact and conclusions of law contained in the AlJ's decision. Subsequently, BCS filed a petition for judicial review in Beaufort County Superior Court. After a hearing, the trial court entered an order reversing the "Final Decision" of the State Board of Education, and petitioner appealed the trial court's decision to this Court.

Our review of the path that this appeal has taken and of the procedure for appealing an administrative decision outlined in N.C. Gen. Stat. § 115C-116, shows that this case was improperly before the State Board of Education and the trial court. The ALJ should have filed his decision as a final decision and included notice to the parties of their right to file notice of appeal with the Superintendent of Public Instruction for a hearing before a Review Officer. As it was, the parties were erroneously notified that the ALJ's decision was not final and that they had the right to file exceptions and arguments with the State Board of Education.

Because the statute from which jurisdiction in the OAH is derived in this case specifically directs that the ALJ's decision is final and that appeals from such decision are to be heard before a Review Officer, we conclude that neither the State Board of Education nor the trial court had jurisdiction

over this action. Accordingly, we vacate the orders of the State Board of Education and the trial court.

Further, because the ALJ improperly treated his decision as a recommended decision and not only failed to notify the parties of their right to file notice of appeal with the Superintendent of Public Instruction for a hearing before a Review Officer but also erroneously notified the parties that the State Board of Education would make the final decision in this case, we remand this case to the ALJ to enter a final decision and notify the parties of their right to appeal under N. C. Gen. Stat. § 115C-116(i).

Vacated and remanded

Judges EAGLES and GREENE concur.

A TRUE COPY
CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA

BYs/Doris P. Cole
DEPUTY CLERK
2-15-1994

NORTH CAROLINA **File No. 90CVS 721**
In the General Court of Justice
BEAUFORT COUNTY **SUPERIOR COURT DIVISION**

BEAUFORT COUNTY SCHOOLS
Petitioner

v. **ORDER**

JANET ROACH
Respondent

This cause coming on to be heard before the undersigned judge presiding over the May 4, 1992 Civil Term of Superior Court upon the petition of the Beaufort County Schools to review the Final Decision of the State Board of Education; and after reviewing the complete administrative record and the applicable law and after considering the arguments of counsel and applying the "whole record" test the Court finds the following facts and makes the following conclusions of law:

Findings of Fact

1. The respondent's daughter Ginger Leigh Goforth, is a behaviorally emotionally handicapped child. She has experienced multiple hospitalizations and residential placements over the years.

ORDER OF THE SUPERIOR COURT CONTINUED . . .

2. In October of 1987 the respondent had Ginger committed to Brynn Marr Hospital in Jacksonville, N. C. with help from the Tideland Mental Health Center.

3. On December 9, 1987 Ginger was moved directly from Brynn Marr to The Whitaker School at Butner, N. C. During her enrollment there she went home frequently for weekend visits. The last two months of her placement there her visits were scheduled every weekend and The Whitaker School Staff felt that she could be served in a less restrictive environment.

4. The respondent did not want Ginger to return home and wrote a letter to ask for a due process hearing. She had read in the parent's handbook that pending a due process hearing there could not be a change in placement. The respondent's letter was rejected by the Office of Administrative Hearings on the ground that it did not constitute a petition in accordance with G. S. 150B-23(a).

5. Ginger was discharged from the Whitaker School on February 22, 1989 and returned to Beaufort County to live with her family.

6. On March 1, 1989, Mrs. Rosa Beamon, Program Administrator, Exceptional Children Programs, Beaufort County Schools, mailed out notices of a meeting of the School Based Committee to be held on March 6, 1989 to make plans

for the educational placement of the respondent's daughter. The respondent did not attend this meeting and another meeting was scheduled for March 27, 1989. The respondent attended this meeting accompanied by Mrs. Delores Arceneaux, an advocacy specialist with the Governor's Advocacy Council for Persons with Disabilities.

7. At this meeting Mrs. Beamon advised the respondent and Mrs. Arceneaux that the Beaufort County Schools could provide a teacher, a self-contained BEH classroom, and a full time teacher assistant. This had been recommended by The Whitaker School Staff. At this time the Beaufort County Schools had a current IEP dated January 9, 1989 which had been prepared by The Whitaker School Staff. The respondent stated that she did not want Ginger at home but she did not refuse the self-contained classroom and Mrs. Beamon and Mrs. Rebecca Joyner, the teacher employed to teach Ginger at Bath School, began an IEP on the current evaluations received from The Whitaker School.

8. Before this IEP was completed funding was obtained by the Tideland Mental Health Center for a residential placement and on April 10, 1989, without prior notice to the Beaufort County Schools, the respondent placed her daughter at NOVA, a private residential center in Kinston, N. C. where Ginger's teacher was furnished by the Lenoir County Schools.

ORDER OF THE SUPERIOR COURT CONTINUED . . .

9. On August 15, 1989 the Tideland Mental Health Center called a meeting to discuss the fact that the funding for placement of Ginger at NOVA was about to expire. The respondent attended this meeting with Mr. Paul Womack, an advocacy specialist with the Governor's Advocacy Council for Persons With Disabilities. Mrs. Beamon attended this meeting and stated that the Beaufort County Schools could provide a BEH self-contained classroom and a teacher assistant for Ginger at Northside High School. At the conclusion of this meeting Mr. Womack was asked to consider the possibility of the Lutheran Family Services providing services for Ginger, the continued placement of Ginger at Nova, and the self-contained learning disabled resource in the Beaufort County Schools. He discussed these options with the respondent. It was the respondent's preference to keep her daughter at Nova and in Mr. Womack's view, the final decision was hers.

10. Mr. Womack had further discussions with some of those in attendance at the meeting and with a representative of NOVA but he had no further discussions with anyone from the Beaufort County Schools. On September 20, 1989 the Petition for a Contested Case Hearing upon which this matter arises was prepared by the Governor's Advocacy Council for Persons With Disabilities and signed by the respondent. In accordance with G.S. 115C-116(1) Ginger remained at NOVA after the

ORDER OF THE SUPERIOR COURT CONTINUED . . .

funding provided by the Tideland Mental Health Center expired during the period of administrative review.

11.There is no substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150b-31 in view of the entire record as submitted within the meaning of G.S. 150B-51 (b)(5) to support a finding of fact that the Beaufort County Schools has not properly offered or provided an appropriate education for Ginger Goforth since her release from Whitaker School, nor a finding of fact that since her release from Whitaker School residential care benefits have been essential for her to make any educational progress and to receive an appropriate education.

12. The Beaufort County Schools has properly offered to provide an appropriate education for Ginger Goforth since her release from Whitaker School.

13. At no time has the Beaufort County Schools proposed to initiate or change or refused to initiate or change, the identification, evaluation or educational placement of the respondent's daughter, Ginger, as a child with special needs.

14. Substantial rights of the petitioner Beaufort County Schools have been prejudiced because the State Board of Education's findings, inferences, conclusions, and decision are

ORDER OF THE SUPERIOR COURT CONTINUED . . .

affected by other error of law and unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted.

Conclusions of Law

1 Each local educational agency is required to provide free appropriate special education and related services for all children with special needs who are residents of the agency's district.

2. These services must be provided in the least restrictive appropriate setting.

3. These services must be provided pursuant to a current individualized educational program (IEP).

4. An IEP must be established or revised each school year and then reviewed and, if appropriate, revised periodically, but not less than annually.

5. The parent, guardian, or surrogate parent of a child must be notified when the local educational agency proposes to initiate or change the identification, evaluation, or educational placement of a child as a child with special needs.

ORDER OF THE SUPERIOR COURT CONTINUED . . .

6. A parent, guardian, or surrogate parent may obtain review of a proposed decision on the grounds set forth in G.S. 115C-116(e).

7. Under the foregoing facts the Beaufort County Schools had no legal obligation to fully develop an IEP for Ginger Goforth and present it to the respondent along with her procedural rights and safeguards.

8. Substantial rights of the petitioner Beaufort County Schools have been prejudiced because the State Board of Education's findings, inferences, conclusions, and decision are affected by error of law;

9. The State Board of Education's findings, inferences, and conclusions should be modified in accordance with the foregoing and its decision reversed.

NOW, THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the State Board of Education's findings, inferences, and conclusions be, and the same hereby are, modified in accordance with the foregoing, and the State Board of Education's decision be, and the same hereby is, reversed.

ORDER OF THE SUPERIOR COURT CONTINUED . . .

Nunc pro tunc the 8th day of May, 1992.

s/W. Russell Duke, Jr.
W. Russell Duke, Jr.
Judge Presiding

NORTH CAROLINA	**BEFORE THE STATE BOARD OF EDUCATION**
WAKE COUNTY	**89EDC0947**

JANET ROACH,	)	
Petitioner	)	
	)	
v.	)	
	)	**FINAL DECISION**
BEAUFORT COUNTY SCHOOLS,	)	
	)	
	)	
Respondent	)	

Having fully considered the record of the above-styled contested case, including the Recommended Decision issued therein by Administrative Law Judge Fred G. Morrison, Jr., dated July 25, 1990, the State Board of Education in its regular meeting held September 6, 1990, makes the following:

FINDINGS OF FACT

The Findings of Fact as contained in the Recommended Decision are hereby adopted and incorporated by reference as fully as if set out herein.

Based on the foregoing Findings of Fact, the State Board of Education makes the following:

FINAL DECISION OF THE STATE BOARD OF EDUCATION CONTINUED . . .

CONCLUSIONS OF LAW

The Conclusions of Law as contained in the Recommended Decision are hereby adopted and incorporated by reference as fully as it set out herein.

IT IS THEREFORE DECIDED that the Respondent must provide Ginger Goforth with an appropriate education and reimburse Petitioner for reasonable private placement costs from February 22, 1989, until it does so.

s/Howard H. Haworth
Howard H. Haworth
Chairman, State Board of Education

CERTIFICATE OF SERVICE

A copy of the foregoing Final Decision was delivered by certified mail, return receipt requested, to:

Ms. Judy Burke
Attorney at Law
1318 Dale St., Suite 100
Raleigh, NC 28605
Attorney for Petitioner

Mr. Lee Knott
Attorney at Law
P. O. Box 548
Washington, NC 27889
Attorney for Respondent

This the 6th day of September, 1990.

s/Bob Etheridge
Bob Etheridge
Secretary, State Board of Education

STATE OF NORTH CAROLINA **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

COUNTY OF BEAUFORT **89 EDC 0947**

JANET ROACH,	)	
PETITIONER,	)	
	)	
V.	)	**RECOMMENDED DECISION**
	)	
BEAUFORT COUNTY SCHOOLS,	)	
	)	
RESPONDENT.	)	

This matter was heard before Fred Gilbert Morrison, Jr., Administrative Law Judge, on May 9, 1990, in Washington, North Carolina. At the conclusion of the hearing, the parties were given 30 days from their date of receipt of the entire transcript to file and serve proposed findings of fact and written arguments. Petitioner filed a proposal on June 28, 1990. Respondent filed its proposal on June 29, 1990.

APPEARANCES

FOR THE PETITIONER: Judy Burke
Attorney at Law
Raleigh, North Carolina,
appearing

FOR THE RESPONDENT: Lee Knott
Attorney at Law
Washington, North Carolina,
appearing

RECOMMENDED DECISION OF THE ALJ CONTINUED . . .

ISSUE

Whether the Respondent has failed to provide a free, appropriate education for the Petitioner's child.

FINDINGS OF FACT

1. The Petitioner's daughter, Ginger Leigh Goforth, is a behaviorally-emotionally handicapped child with a long history of being aggressive and violent. She has experienced multiple hospitalizations and residential placements over the last ten years with little lasting improvement. Generally, episodes of violence or suicide attempts have prompted hospitalizations.

2. In April of 1987 Ginger was released from Eastern State Hospital in Newport News, Virginia. Her family moved to North Carolina and enrolled her in the Beaufort County Schools in August of 1987. She was placed in a self-contained BEH classroom at Bath High School. In October of 1987, she went out of control and became violent, demolishing a considerable amount of school property in the weight training room.

3. With help from the Tideland Mental Health Center, the Petitioner had Ginger committed to Brynn Marr Hospital in Jacksonville, N. C.

4. Ginger was moved directly from Brynn Marr to The Whitaker School, Butner, N. C., on December 9, 1987.

5. Early in her enrollment at the Whitaker School, Ginger did present psychotic type behaviors on several occasions. To remain at The Whitaker School a child must show behaviors that can be considered dangerous to self or others in the last sixty days. In late 1988 Ginger had not displayed those behaviors in over four months and The Whitaker School determined that her discharge was necessary and convened a community planning conference for January 5, 1989.

6. At a community planning conference held January 5, 1989, Mr. Jack Wallace, principal of Bath High School, stated that returning Ginger to Bath High School would not be a good idea as Ginger's destruction of school property had made her very unpopular. Mrs. Rosa Beamon, Program Administrator, Exceptional Children Programs, Beaufort County Schools, stated that the Beaufort County Schools could offer Homebound Services. Marilyn Thomson, Unit Supervisor, and Helen Cagle-Crumbley, Liaison Teacher/Counselor, both of The Whitaker School, stated that a self-contained BEH class or day treatment would meet Ginger's needs in a

less restrictive environment, with group placement as a back-up.

7. On February 22, 1989, Ginger was discharged from The Whitaker School and returned to Beaufort County to live with her family. At this time she continued to be a child with special needs (BEH) for whom Respondent was responsible to provide a free, appropriate education.

8. On March 1, 1989, Rosa Beamon, Program Administrator, Exceptional Children Programs, Beaufort County Schools, mailed out notices of a meeting of the School Based Committee to be held March 6, 1989, at 3:00 p.m. at the Beaufort County Schools Administrative Office Building for the purpose of planning Ginger's placement.

9. The Petitioner failed to appear at the meeting so Mrs. Beamon telephoned her and was advised that the Petitioner was not coming to the meeting upon the advice of her attorney. It was decided by those present that when and if the Petitioner contacted the school to enroll Ginger that it be suggested that she have Homebound Services or limited time at school with a teacher assistant and much support from the Tideland

Mental Health Center. No IEP for Ginger was developed at this meeting.

10. Another meeting was requested and on March 17, 1989, Mrs. Beamon mailed out notices of a meeting to be held March 27, 1989, at 3:00 p.m.

11. The Petitioner appeared at this meeting along with a representative from The Governor's Advocacy Council. The Petitioner was advised that a teacher assistant had been employed by the Beaufort County Schools to work with Ginger on her return to Bath High School in a BEH self-contained classroom setting. The Petitioner stated that she did not want Ginger at home.

12. At that meeting, the Beaufort County Schools began preparation of an Individualized Education Program/Service Delivery Plan for Ginger, but did not complete same nor advise Petitioner of her rights.

13. Meanwhile funding was obtained by the Tideland Mental Health Center for a residential placement and on April 10, 1989, without prior notice to the Beaufort County Schools, the Petitioner placed Ginger at NOVA, a private residential treatment center in Kinston, N. C.

14. At NOVA the children attend classes on the premises. The teachers are provided by the Lenoir County Schools or the Kinston City Schools depending on the location of the facility. The Lenoir County Schools provided Ginger's teacher.

15. The initial funding by the Tideland Mental Health Center for Ginger ran through the end of July, 1989. Additional funding was obtained for August and September, 1989.

16. On August 15, 1989, the Tideland Mental Health Center called a meeting to discuss the fact that funding for Ginger's placement at NOVA was ending. Rosa Beamon and Dan Winslow, School Psychologist for the Beaufort County Schools were invited to attend. When asked what the school could provide, Rosa Beamon reported that the Beaufort County Schools could provide education but not treatment for Ginger. She stated that the Beaufort County Schools program would consist of a resource or full-time BEH placement depending on Ginger's need and a full-time teacher assistant at Northside High School. Shortly after this meeting the petition for a contested case hearing was filed and Ginger has remained at NOVA.

17. Ginger Goforth is receiving an appropriate education at the NOVA Group Home in Kinston, North Carolina. She appears to function best in this type of environment and needs the social interactions it provides.

18. Respondent has not properly offered or provided an appropriate education for Ginger Goforth since her release from Whitaker School.

19. Since Ginger Goforth's release from Whitaker School, residential care benefits have been essential for her to make any educational progress. She has needed a residential placement in order to receive an appropriate education.

20. Because of her prior history, Respondent's officials were very uneasy about Ginger returning to public schools upon her release from Whitaker.

21. Respondent's officials did not give written notice containing their proposed placement with a full explanation of procedural safeguards available to Petitioner following her daughter's release from Whitaker School.

RECOMMENDED DECISION OF THE ALJ CONTINUED . . .

CONCLUSIONS OF LAW

1. Ginger Leigh Goforth is a handicapped child as defined by the federal Education for All Handicapped Children Act, 20 U.S.C. §1401, et seq., and is entitled to a free appropriate public education pursuant to Article 9 of Chapter 115C of the North Carolina General Statutes and pursuant to EHCA.

2. The Respondent has failed to provide a free appropriate education for Ginger Leigh Goforth by not fully developing an IEP and presenting it in writing to Petitioner along with her procedural rights and safeguards as required.

RECOMMENDED DECISION

It is recommended that the Respondent provide Ginger Goforth with an appropriate education and reimburse Petitioner for reasonable private placement costs from February 22, 1989, until it does do.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings,

P.O.Drawer 11666, Raleigh, N.C. 27604, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S.150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the State Board of Education.

This the 25th day of July, 1990.

s/Fred G. Morrison Jr.
Fred G. Morrison Jr.
Administrative Law Judge

RELEVANT PORTIONS OF 34 C.F.R §§ 300.340-300.350

INDIVIDUALIZED EDUCATION PROGRAMS

§ 300.340 Definitions.

(a) As used in this part, the term "individualized education program" means a written statement for a child with a disability that is developed and implemented in accordance with §§ 300.341-300.350.

(b) As used in §§ 300.346 and 300.347, "participating agency" means a State or local agency, other than the public agency responsible for a student's education, that is financially and legally responsible for providing transition services to the student.

(Authority: 20 U.S.C. 1401(a)(20))

§ 300.341 State educational agency responsibility.

(a) *Public agencies.* The SEA shall ensure that each public agency develops and implements an IEP for each of its children with disabilities.

(b) *Private schools and facilities.* The SEA shall ensure that an IEP is developed and implemented for each child with a disability who—

(1) Is placed in or referred to a private school or facility by a public agency; or

RELEVANT PORTIONS OF 34 C.F.R §§ 300.340-300.350 CONTINUED . . .

(2) Is enrolled in a parochial school or other private school and receives special education or related services from a public agency.

(Authority: 20 U.S.C. 1412 (4), (6); 1413(a)(4))

. . . .

§ 300.342 When individualized education programs must be in effect.

(a) At the beginning of each school year, each public agency shall have in effect an IEP for every child with a disability who is receiving special education from that agency.

(b) An IEP must—

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 300.343.

(Authority: 20 U.S.C. 1412(2)(B), (4), (6); 1414)(a)(5); Pub. L. 94-142, sec. 8(c) (1975))

NOTE: Under paragraph (b)(2) of this section, it is expected that the IEP of a child with a disability will be implemented immediately following the meeting under § 300.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances that require a short delay (e.g.,

working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

§ 300.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability. . . .

. . . .

(c) *Timeline.* A meeting to develop an IEP for a child must be held within 30 calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

(Authority: 20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5))

NOTE: The date on which agencies must have IEPs in effect is specified in § 300.342 (the beginning of each school year). However, except for new children with disabilities (i.e., those evaluated and determined to need special education and related services for the first time), the timing of meetings to

develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect at the beginning of the school year, agencies could hold mettings either at the end of the preceding school year or during the summer prior to the next school year. Meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review and, if appropriate, revise each child's IEP. The timing of those meetings could be on the anniversary date of the child's last IEP meeting, but this is left to the discretion of the agency.

. . . .

§ 300.345 Parent participation.

(a) Each-public agency shall take steps to ensure that one or both of the parents of the child with a disability are present at each meeting or are afforded the opportunity to participate, including—

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

RELEVANT PORTIONS OF 34 C.F.R §§ 300.340-300.350 CONTINUED . . .

(b)(1) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting and who will be in attendance;

(2) If a purpose of the meeting is the consideration of transition services for a student, the notice must also—

(i) Indicate this purpose;

(ii) Indicate that the agency will invite the student; and

(iii) Identify any other agency that will be invited to send a representative.

(c) If neither parent can attend, the public agency shall use other methods to ensure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as—

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings at a meeting, including arranging for an

interpreter for parents with deafness or shoe native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the IEP.

(Authority: 20 U.S.C. 1401(a)(20); 1412 (2)(B), (4), (6); 1414 (a)(5))

NOTE: The notice in paragraph (a) of this section could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c) of this section, the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

. . . .

§ 300.348 Private school placements by public agencies.

(a) *Developing individualized education programs.* (1) Before a public agency places a child with a disability in , or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an IEP for the child in accordance with § 300.343.

(2) The agency shall ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency shall use other

RELEVANT PORTIONS OF 34 C.F.R §§ 300.340-300.350 CONTINUED . . .

methods to ensure participation by the private school or facility, including individual or conference telephone calls.

(3) [Reserved]

(b) *Reviewing and revising individualized education programs.* (1) After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the direction of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall ensure that the parents and an agency representative:

(i) Are involved in any decision about the child's IEP; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.349 Children with disabilities in parochial or other private schools.

If a child with a disability is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall—

RELEVANT PORTIONS OF 34 C.F.R §§ 300.340-300.350 CONTINUED . . .

(a) Initiate and conduct meetings to develop, review, and revise an IEP for the child, in accordance with § 300.343; and

(b) Ensure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school, including individual or conference telephone calls.

(Authority: 20 U.S.C. 1413(a)(4)(A))

. . . .

§ 300.350 Individualized education program—accountability.

Each public agency must provide special education and related services to a child with a disability in accordance with and IEP. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(Authority: 20 U.S.C. 1412(2)(B); 1414(a)(5), (6); Cong. Rec. at H7152 (daily ed., July 21, 1975))

Supreme Court, U.S.
FILED
OCT 17 1994
OFFICE OF THE CLERK

No. 94-598

In The

Supreme Court of the United States

October Term, 1994

JANET ROACH,

Petitioner,

v.

BEAUFORT COUNTY SCHOOLS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of North Carolina

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the North Carolina Court of Appeals erred in finding in the particular circumstances of this case that the Beaufort County Schools had not failed to provide a free appropriate education to petitioner's child.

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No. 94-598

In The

Supreme Court of the United States

October Term, 1994

JANET ROACH,

Petitioner,

v.

BEAUFORT COUNTY SCHOOLS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of North Carolina

BRIEF IN OPPOSITION

The Beaufort County Schools respectfully submits a brief in opposition to the petition for certiorari to review the decision of the Supreme Court of North Carolina filed by Janet Roach.

OPINIONS BELOW

The Supreme Court of North Carolina entered its Order on June 23, 1994, denying petitioner's Petition for Discretionary Review of the decision of the Court of Appeals of North Carolina reported at 443 S.E.2d 339 (N.C. Ct. App. 1994).

JURISDICTION

The Supreme Court entered its Order on June 23, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The Individuals with Disabilities Act, 20 U.S.C. § 1400, *et seq.*

STATEMENT OF THE CASE

This case was filed by petitioner, Janet Roach, September 26, 1989 in the Office of Administrative Hearings pursuant to North Carolina's Administrative Procedures Act, N.C. Gen. Stat. § 150B-23, alleging that respondent, Beaufort County Schools, had failed to provide a free appropriate public education for petitioner's daughter. A hearing was held and the Administrative Law Judge issued a Recommended Decision to the State Board of Eduction in petitioner's favor.

Based on the record of the Administrative Hearing, the North Carolina State Board of Education adopted in full the Administrative Law Judge's Findings of Fact and Conclusions of Law as contained in his Recommended Decision and ruled that respondent must provide petitioner's daughter with an appropriate education and must reimburse petitioner for reasonable private placement costs from February 22, 1989 until the school system provided an appropriate education.

Pursuant to the North Carolina Administrative Procedures Act, respondent filed a Petition for Judicial Review in the Beaufort County Superior Court and the court reversed the decision of the State Board of Education.

Petitioner gave notice of appeal to the North Carolina Court of Appeals which filed an opinion vacating and remanding the trial court's decision on February 15, 1994. However, on February 16, 1994, respondent's attorney wrote a letter to the court of appeals pointing out that it had relied upon a statute enacted subsequent to the filing of that action in rendering its decision. The court of appeals thereafter entered an order withdrawing this opinion on February 18, 1994.

On April 19, 1994, the court of appeals issued a new opinion holding that respondent had violated the IDEA in failing to fully develop an Individualized Education Program ("IEP") but that respondent had not failed to provide a free appropriate education for petitioner's daughter.

Petitioner filed for discretionary review to the Supreme Court of North Carolina on the ground, *inter alia*, that the court of appeals had erroneously concluded that failure to fully develop an IEP does not necessarily constitute failure to provide a free appropriate public education. The Supreme Court denied petitioner's petition.

In brief, the facts of the case are as follows: Petitioner's daughter, Ginger Goforth, is a Behaviorally Emotionally Handicapped (BEH) child. In August of 1987, Ginger was enrolled in the Beaufort County Schools

("BCS") system at Bath High School and placed in a self-contained BEH class. In October of 1987, following a violent episode, petitioner committed Ginger to Brynn Marr Hospital with the help of the Tideland Mental Health Center. On December 9, 1987, Ginger was moved directly from Brynn Marr to The Whitaker School, a school in Granville County for children who exhibit behavior that could be considered dangerous to themselves or others. In late 1988, The Whitaker School determined that Ginger's discharge was necessary because Ginger could be served in a less restrictive environment. A community planning conference to discuss Ginger's release from Whitaker was held on January 5, 1989.

The principal of Bath High School and the Program Administrator for Exceptional Children Programs of BCS, Rosa Beamon, both attended this meeting. The principal and Ms. Beamon expressed their opinion that because of Ginger's previous violent behavior at Bath High School in 1987, homebound instruction might be appropriate. A teacher and a unit supervisor of The Whitaker School expressed their opinions, however, that a self-contained BEH class or day treatment, with group placement as a back-up, would be a less restrictive way to meet Ginger's needs.

On February 22, 1989, The Whitaker School discharged Ginger, and she returned to Beaufort County. On March 1, 1989, Rosa Beamon mailed out notices of a meeting of the School Based Committee to be held March 6, 1989, for the purpose of planning Ginger's placement. Although informed of this meeting, petitioner chose not to attend. No IEP was developed for Ginger at this meeting although several placement options were discussed.

On March 27, 1989, the School Based Committee held another meeting. The petitioner appeared at this meeting along with a representative from The Governor's Advocacy Council, and petitioner was advised that a teacher assistant had been employed by Beaufort County Schools to work with Ginger on her return to Bath High School in a BEH self-contained classroom setting. Petitioner stated that she did not want Ginger at home but did not refuse this proposed placement. Also at this meeting, BCS began preparing an IEP for Ginger.

Respondent notes that petitioner's statement of the case incorrectly asserts that at the meeting on March 27, 1989 the Beaufort County Schools "did not retract their placement decision." (Petition for Certiorari at 6). The court of appeals and the Administrative Law Judge both specifically found that Beaufort County Schools had offered petitioner a self-contained classroom setting at that meeting.

During this process, on April 10, 1989, without giving prior notice to BCS or specifically challenging any part of the developing IEP, petitioner placed Ginger in NOVA, a private residential treatment center in Lenoir County. At NOVA, Ginger's teacher was provided by the Lenoir County Schools. BCS did not thereafter complete the IEP.

Funding by Tideland Mental Health Center for Ginger to attend NOVA was to run through September 1989, and on August 15, 1989, the Tideland Mental Health Center called a meeting to discuss the fact that funding for Ginger's placement at NOVA was ending. Rosa Beamon and Dan Winslow, School Psychologist for BCS, attended this meeting. At the meeting, Beamon stated

that BCS was prepared to provide a resource or full-time BEH placement depending on Ginger's need and a full-time teacher assistant at Northside High School.

After this meeting the petitioner filed a petition for a contested case hearing. Ginger remained at NOVA until May of 1990, at which time she withdrew. Since that time petitioner has not requested educational services from BCS.

REASONS FOR DENYING THE WRIT

The Decision Below Does Not Conflict With Any Decisions of This Court And There is No Conflict Among the Circuit Courts of Appeal on This Issue; Therefore, The Court Should Deny Petitioner's Writ.

In filing this petition, petitioner seeks review of a narrow decision by a state court. The North Carolina Court of Appeals found, based on the specific facts of this case, that the respondent school board had violated the procedural regulations of the IDEA but that the violation did not amount to a denial of a free appropriate education. Specifically, the court concluded that respondent had violated the IDEA when it failed to complete the IEP development process even though petitioner unilaterally and without notice placed her daughter in a private residential treatment facility in another county where educational services were provided by the local public school system. The court further held that this procedural error did not result in a denial of a free appropriate education, rather petitioner's act of placing her daughter in another

school system was the actual cause for respondent's failure to provide services.

Petitioner asserts that this decision of the North Carolina Court of Appeals conflicts with precedent from this Court, notably *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985), *Board of Education v. Rowley*, 458 U.S. 176 (1982) and *Florence County School District Four v. Carter*, ___ U.S. ___, 114 S. Ct. 361 (1993). A comparison of the cases shows that this is far from true. To the contrary, the challenged decision is consistent with this Court's precedent as well as established federal case law.

Petitioner's primary claim is that the failure of respondent to complete the IEP is, in itself, a *per se* failure to provide a free appropriate education. Petitioner misinterprets the decisions of this Court in asserting that any procedural violation of the regulations regardless of surrounding circumstances amounts to a denial of a free appropriate education. No such precedent exists. In fact, lower federal courts uniformly have rejected this strict liability analysis.

In this case, the court of appeals followed the practice of numerous federal courts by considering the effect and magnitude of the procedural violation in deciding whether there was a denial of a free appropriate education. Specifically, the court found that the respondent "was following the correct procedure to provide Ginger with a free appropriate education upon her release from Whitaker School." *Beaufort County Schools v. Roach*, 443 S.E.2d 339, ___, App. of Petition for Cert. at 19a (N.C. Ct. App. 1994). Based on a current IEP from the Whitaker

School, the respondent offered a self-contained BEH classroom with a one-on-one aide and began developing its own IEP. The court of appeals found that the process for providing Ginger with a free appropriate education was, however, interrupted by petitioner when she, without notice and without disagreeing with the proposed placement, unilaterally placed Ginger in a private residential placement facility.

In holding that this interruption in the process did not amount to a failure to provide a free appropriate education, the court of appeals was simply acknowledging what other courts consistently have held: that the inquiry into whether a free appropriate education has been offered is fact specific and is not automatically determined upon a finding of a procedural violation. Federal courts have established a prejudice test which provides that only "procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process" result in a denial of a free appropriate education. *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1484 (9th Cir. 1992). See also, *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990) (holding that a procedural violation involving a failure to meet time limits on notification of parent rights and IEP development did not constitute a failure to provide a free appropriate education); *Roland v. Concord School Committee*, 910 F.2d 983, 994 (1st Cir. 1990) (holding that a procedural violation is not a *per se* indication of failure to provide a free and appropriate education or an appropriate IEP; instead "there must be some rational basis to

believe that procedural inadequacies compromised the pupil's right to an appropriate education . . . ").

Admittedly, in some cases a procedural default will constitute a failure to provide a free appropriate education sufficient to require reimbursement. This was the case in *Hall v. Vance Cty. Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985) on which petitioner heavily relies. In *Hall* the school consistently failed to inform parents of their rights which resulted in a loss of educational opportunity for their son and effectively prevented them from meaningful participation in the IEP development process. By contrast, in the present case the court of appeals found that respondent was following the correct procedures to provide petitioner's daughter with an appropriate education until the time petitioner interrupted the process. Aside from its failure to complete the development of the IEP, the respondent met all procedural requirements of the law. In addition the record clearly shows that petitioner was fully involved in the IEP process along with her parent advocate and there was no showing that her daughter lost educational opportunity due to the respondent's procedural error. Rather, petitioner's daughter received educational services under an IEP through the Lenoir County Schools while a resident at NOVA.

Even if petitioner's assertion were correct (that a failure to adhere to the procedural requirements of the IDEA is equivalent to the denial of a free appropriate education), petitioner is still not entitled to reimbursement. This Court has established a two-part test that a parent must meet in order to qualify for reimbursement. Petitioner has unequivocally failed to meet these requirements. In *Burlington* this Court held that a reviewing

court must find that the private placement chosen by the parent was appropriate under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., and that the educational program offered by the school was not proper under the IDEA. 471 U.S. at 370.

Petitioner never made a showing, nor did the court of appeals find, that the placement of her daughter at NOVA was appropriate. In petitioner's own testimony to the Administrative Law Judge she admits to placing her daughter at NOVA because she was worried about being held financially accountable in the event her daughter had a violent episode in respondent's offered placement. She also admits that she did not refuse the school system's placement on the grounds that she felt it was unacceptable under the IDEA. Nor did she argue to the court of appeals that the program being developed was inappropriate. She relied solely on the argument that the respondent's procedural omission constituted a denial of an appropriate education. Clearly, petitioner's reliance on *Burlington* is misplaced.

Similarly the *Carter* decision does not resolve the issues presented by this case. In *Carter* this Court noted that the two *Burlington* requirements were already settled: "1) the school district's proposed IEP was inappropriate under the IDEA, and 2) . . . Trident . . . provided an education otherwise proper under the IDEA." *Carter*, 114 S. Ct. at 365. The narrow holding of *Carter* is only that "a parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement." *Id.* at 366. In this case there has been no claim made that NOVA was "unapproved." In fact, there have been no findings at all

about the appropriateness of the placement at NOVA or the appropriateness of respondent's offered services. Essentially, petitioner is requesting relief that would run directly contrary to these established precedents. Without meeting the *Burlington* standards petitioner is conclusively not entitled to reimbursement.

To the extent that *Burlington* and *Carter* have any application to the present case, they support the court of appeals' authority to determine the legal consequence of respondent's procedural violation. This Court has stated that once a court determines that the IDEA has been violated, "it is authorized to 'grant such relief as the court determines appropriate.' " *Burlington*, 471 U.S. at 373-374 (citing 20 U.S.C. § 1415(e)(2)). Under the IDEA "equitable considerations are relevant in fashioning relief and the court enjoys broad discretion in so doing." *Carter*, 114 S. Ct. at 366 (citations omitted). In this case, the court weighed most heavily the fact that the petitioner was the root of the school's failure to provide educational services. Equitable considerations dictated that reimbursement was not proper. In reaching its decision, the court properly exercised the discretion that this Court has consistently recognized.

Federal courts have exercised discretion in a similar fashion in making awards of damages and reimbursement. For example, in *Jackson v. Franklin County School Bd.*, 806 F.2d 623 (5th Cir. 1986), the court considered the amount of harm caused by procedural violations in determining the appropriate relief. The court held, "if it is determined the parent would have pursued the same course of action in the absence of any procedural violations, then only nominal damages are appropriate." The

evidence in this case suggests that the parent did not reject the IEP being developed by respondent but placed her daughter at NOVA out of fear of potential liability if her daughter caused personal or property damage. Consistent with this evidence a court could find that the parent would have pursued a placement at NOVA regardless of the school system's procedural violation and, following the *Jackson* reasoning, deny reimbursement on this basis.

In her petition, the petitioner concludes by urging this Court to grant certiorari in order to prevent other state courts from reaching a similar decision. As respondent has already stated, this case turns on its individual facts. Those facts were properly analyzed by the court of appeals and in its discretion it ruled that reimbursement was not justified. The chances of a similar case arising in North Carolina or in any other state are merely speculative. They are certainly too uncertain to require this Court to consider the issue at this time. In the unlikely event that a trend of conflicting decisions arises in the lower courts, at that point the Court could examine the issues and consider review.

In summary, the Court should reject petitioner's appeal. The decision below is not in conflict with this Court's precedent, is consistent with existing case law and does not raise an issue of sufficient significance to merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 17, 1994.